Supreme Court No. 85581-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JARED PECK,

Plaintiff,

and JAMES BOWDEN,

Plaintiff-Appellant,

v.

CINGULAR WIRELESS LLC, et al.,

Defendants-Appellees.

APPELLEES' OPPOSING BRIEF ON CERTIFICATION FROM THE NINTH CIRCUIT COURT OF APPEALS

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I. INTRODUCTION

Rather than address the issue that the Ninth Circuit certified to this Court, Plaintiff James Bowden asks the Court to reformulate the certified question and then completely ignores the question that the Ninth Circuit certified. The Ninth Circuit's certification order is clear. Addressing the specific facts in this case and comparing those facts to the circumstances presented in relevant Washington case law, the Ninth Circuit noted:

> In this case, Cingular disclosed that it would charge and collect a surcharge for gross receipts taxes before Bowden purchased his phone service plan. However, unlike either *Johnson* or *Nelson*, Cingular did not disclose the actual amount of the surcharge, which would vary depending on the service plan and the monthly usage. In addition, Bowden accepted the plan and the B & O tax surcharge, but did not object to the inclusion of the B & O tax surcharge nor did he attempt to make adjustments to the terms or price of the plan.

Certification Order at 1333 (*citing Johnson v. Camp Auto., Inc.*, 148 Wn. App. 181, 199 P.3d 491 (2009); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007)). Having identified both the operative facts and the precise issue that is not conclusively addressed by existing case law, the Ninth Circuit stated the certified question as follows:

> Under Revised Code of Washington section 82.04.500, may a seller recoup its business and occupation taxes where, prior to the sale of a monthly service contract, the seller discloses that in addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes?

Id. As can be seen, the Ninth Circuit wants to know whether a seller can lawfully recoup B&O taxes where *prior to a sale* it discloses *the fact but not the amount* of that surcharge.

The answer to the Ninth Circuit's question is "yes." The court addressed an analogous issue in *Robinson v. Avis Rent a Car System, Inc.*, 106 Wn. App. 104, 117, 22 P.3d 818 (2001), holding that businesses can properly comply with Washington's consumer protection statute by disclosing the nature but not the amount of fees that are added to a base rate. Federal courts have similarly so held. *See, e.g., Smale v. Cellco P'ship*, 547 F. Supp. 2d 1181, 1187 (W.D. Wash. 2008) (holding that telecommunications provider was not required to disclose amount of city tax as part of its consumer contract). The same reasoning and result apply equally to Washington's B&O tax statute. Indeed, discussed below, a contrary interpretation would raise serious preemption concerns and ultimately would make no sense – legally or factually.

Rather than address the certified question, Bowden asks the Court to reformulate the question and address an entirely different question – one that assumes that the B&O surcharge was *not* disclosed to Bowden prior to the final sale. The Court should reject that request. First, the Ninth Circuit specifically rejected the reformulated question when

Bowden proposed it initially. Second, the reformulated question is contrary to the Ninth Circuit's determination and record evidence establishing that Cingular disclosed the B&O surcharge prior to the final sale. No purpose would be served by answering a question that the Ninth Circuit did not certify. This argument, like Bowden's other arguments, should be rejected.

II. ISSUES PRESENTED

1. "Under Revised Code of Washington section 82.04.500, may a seller recoup its business and occupation taxes where, prior to the sale of a monthly service contract, the seller discloses that in addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes?" Certification Order at 1333.

2. Whether the Court should reformulate the certified question as requested by Bowden even though (a) the Ninth Circuit specifically rejected the reformulated question in deciding to certify this matter, and (b) the reformulated question is factually incorrect and nonsensical.

III. STATEMENT OF THE CASE

A. The B&O Surcharge.

Bowden's claims all involve, one way or another, the Washington Business and Occupation Tax, referred to herein as the "B&O tax." Washington assesses this tax on the gross receipts of companies doing

business in the state. RCW 82.04.535. Until early 2006, Cingular Wireless (now known as AT&T, but referred to in these proceedings as "Cingular") passed the cost of this tax through to Washington subscribers in its rates for wireless service. ER 239. Cingular listed the charge as a separate line item on each customer's bill, calling it the "B&O Surcharge." Certification Order at 1331; ER 126, 239.[1]

B. Cingular Properly Disclosed The B&O Surcharge To Bowden Prior To Finalizing His Sale.

Bowden has managed businesses for most of his career. SER 42. As a result, he was familiar with Washington's B&O tax. SER 56. Indeed, from 2000 through 2002, Bowden was a Sprint customer and paid a similar surcharge to Sprint during that time period. SER 46, 160. He therefore knew that some wireless service providers, like Cingular, collect such a surcharge from their subscribers.

In November 2004, after researching competing wireless service providers, Bowden visited a Cingular kiosk in a shopping mall to switch his wireless service to Cingular. Certification Order at 1330; SER 46, 48. Bowden admitted at his deposition that he received, signed, and initialed three Wireless Service Agreements, one for each of the three lines of

[1] As used herein, "ER" refers to Appellant's Excerpts of Record and "SER" refers to Cingular's Supplemental Excerpts of Record, both filed in the Ninth Circuit proceedings.

service he was purchasing. Certification Order at 1330-31; SER 48. The one-page agreements disclose that "Cingular also imposes the following charges: . . . ***a gross receipts surcharge . . . .***" Certification Order at 1331; ER 163-65 (emphasis added). The agreements incorporate the Cingular Wireless Terms of Service, which Bowden received at the time of purchase. Certification Order at 1331; ER 163-65; SER 46, 50. These documents (the Wireless Service Agreement and Terms of Service) are referred to collectively herein as the "2004 Contract." Bowden represented that he read, understood, and agreed to be bound by those terms. ER 163-65.

The Terms of Service that are part of the 2004 Contract include the following provision:

> Charges include, without limitation, airtime, roaming, recurring monthly service, activation, administrative, and late payment charges; **regulatory cost recovery and other surcharges**; optional feature charges; toll, collect call and directory assistance charges; any other charges or calls billed to your phone number; **and applicable taxes and governmental fees, whether assessed directly upon you or upon Cingular**.

SER 97 (emphases added). As the emphasized text shows, Cingular specifically and clearly discloses that charges include "applicable taxes," including taxes – like the B&O tax – that are assessed "upon Cingular." *Id.*

Additional disclosures can be found both through Cingular's website, which Bowden visited before signing up with Cingular, and in Bowden's rate plan, which the 2004 Contract incorporates by reference. Certification Order at 1331; SER 46, 54, 56. Rate plans in effect in 2004 included the following language: "Cingular also imposes the following charges: . . . ***a gross receipts surcharge . . . .***" ER 160-61 (emphasis added). Cingular provided additional disclosures to Bowden through its website in a section called "Understanding Your Bill," which provided a pop-up called "Credits, Adjustments & Other Charges." SER 228, 231-32. The pop-up explained:

> This section lists the credits and/or other charges for services, fees, or other special charges (when they apply). Your activation fee will also be listed here. The Regulatory Cost Recovery Charge / Regulatory Program Charge, Universal Service Fund Fee, and ***Gross Receipts surcharge*** are in this section.

SER 232 (emphasis added). From at least November 2004 – when Bowden first became a Cingular subscriber – the website included an "Additional Charges Details" pop-up that subscribers could click to obtain even more information about surcharges. That pop-up stated:

State Gross Receipts Surcharge

> A fee that Cingular Wireless assesses on the customer that allows it to recover its costs with regard to specific government taxes imposed on the Company's gross receipts. The Gross Receipts Surcharge is not a mandated charge to the customer.

SER 133, 141. These disclosures, like the 2004 Contract that Bowden signed and accepted, make it clear that Cingular passed to its subscribers applicable taxes and governmental fees like the B&O tax.

C. Bowden Paid The B&O Surcharge For Years Without Complaint And Then Joined This Lawsuit.

Bowden received his first bill from Cingular in December 2004. SER 134-56. That bill contained four primary sections: "Monthly Service Charges," "Usage Charge Details," "Credits, Adjustments & Other Charges," and "Government Fees & Taxes." *Id.* Under the section called "Credits, Adjustments & Other Charges," there was a subsection called "Gross Receipts Surcharges to Recover," and under that subsection was a line item called "State B and O Surcharge." Certification Order at 1331; ER 137.

Bowden reviewed the bill and paid it in full, including the B&O surcharge. SER 51, 54. Not only did Bowden pay that bill without complaint, he paid every bill he received during the two years that he was a Cingular subscriber. SER 54-55. Each bill until January 2006 contained a B&O surcharge. ER 239. Bowden never wrote, called, or otherwise

attempted to communicate with Cingular about the B&O surcharge, although he called to complain about other issues. ER 157; SER 54-55. Nor did he follow the terms of his contract for disputing his bills, which require that he dispute any improper charges within 100 days. ER 267.[2]

Indeed, Bowden expressed no concerns whatsoever about the B&O surcharge until October 2008 – nearly two years after he ended his Cingular contract and nearly three years after paying his last B&O surcharge. SER 44, 54, 58. And he did so only after meeting with his attorney on an unrelated matter. *Id.* Shortly thereafter, he joined this lawsuit (which at the time was pending in state court) as a new named plaintiff and moved to pursue his claims on a class-wide basis. SER 198-206.

D. Procedural Background.

The district court ultimately rejected Bowden's claims on summary judgment. Addressing the issues germane to the certified question, the district court judge concluded, by reference to his prior order in a parallel case (ER 6), that Cingular did not violate RCW 82.04.500 because "the B

[2] Specifically, the 2004 Contract states: "WITHIN 100 DAYS OF THE DATE OF THE BILL, NOTIFY US IN WRITING . . . OF ANY DISPUTE YOU HAVE WITH RESPECT TO THE BILL . . . OR YOU WILL HAVE WAIVED YOUR RIGHT TO DISPUTE THE BILL OR SUCH SERVICES AND TO BRING, OR PARTICIPATE IN, ANY LEGAL ACTION RAISING ANY SUCH DISPUTE." ER 267; SER 97.

& O surcharge was disclosed during the negotiation process and it was treated as part of the base amount charged to customers, rather than as a tax added to the final price." Certification Order at 1332 (internal quotation marks and citation omitted). Addressing the amount of the surcharge, the district court added: "Like other taxes and fees, Cingular was not required to disclose the computation of the tax or predict the amount of the surcharge. Thus, there was no violation of Washington code." *Id.*

Bowden filed a timely notice of appeal, and eventually asked the Ninth Circuit to certify four questions to this Court. Although the Ninth Circuit granted Bowden's motion, it did not accept three of Bowden's proposed questions and it revised the other to be consistent with record evidence. Addressing that evidence, the Ninth Circuit specifically concluded that "Cingular disclosed that it would charge and collect a surcharge for gross receipts taxes before Bowden purchased his phone service plan." *Id.* at 1333. As discussed in the argument below, the certified question appropriately reflects that determination.

IV. ARGUMENT

A. The Answer To The Certified Question Is "Yes": Under RCW 82.04.500, A Seller May Recoup Its Business And Occupation Taxes Where, Prior To The Sale Of A Monthly Service Contract, The Seller Discloses That In Addition To The Monthly Service Fee, It Collects A Surcharge To Cover Gross Receipts Taxes.

Like many states, Washington has a B&O tax statute, RCW 82.04, *et seq.*, which imposes a tax on the gross receipts of businesses. That statute provides:

> It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

RCW 82.04.500. The critical text, for present purposes, is the latter half of the statute, which makes clear that the B&O tax "shall constitute a part of the operating overhead of" entities – like Cingular – that pay such taxes.

Numerous courts have recognized that the B&O tax, like any other overhead cost, can properly be passed on to consumers. In *Nelson*, this Court established that the controlling question in determining whether a seller can properly collect a surcharge to cover gross receipts taxes is whether the surcharge is *disclosed* to the consumer *prior to* finalizing a sale. Addressing that issue, the Court stated:

> [I]t is lawful for Appleway to disclose a B&O charge to Nelson *during* the course of negotiating a purchase price or later identify any claimed element of overhead. However, Appleway may not add a B&O charge as one of several fees and taxes *after* Appleway and Nelson negotiated and agreed upon a final purchase price.

160 Wn.2d at 181. Thus, so long as a B&O surcharge is disclosed before a transaction is finalized, the seller can properly recoup its B&O taxes under Washington law.

That is precisely what the appellate court held in *Johnson*. There, a car dealership used a "writeback" document to aid the sales process. 148 Wn. App. at 183. The document disclosed a B&O tax charge to purchasers. *Id.* The plaintiffs initialed the document, finalized the purchase, and drove away in their new car. *Id.* They subsequently sued the dealership for allegedly violating RCW 82.04.500, asserting claims for unjust enrichment, declaratory relief, and violation of the WCPA. *Id.* The trial court granted summary judgment in favor of the plaintiffs, holding that the B&O tax statute prohibited the dealership from collecting the B&O charge. *Id.*

The appellate court reversed and granted summary judgment in favor of the defendant on all claims. It explained that RCW 82.04.500 does *not* erect a complete bar to surcharges. 148 Wn. App. at 184. Instead, a business "may itemize the tax if it is part of the final purchase price." *Id.* (internal quotation marks and citation omitted). As the court in

Johnson explained, a business satisfies this requirement by "disclos[ing] the B&O charge during negotiations . . . ." *Id.* at 185. The car dealership in *Johnson* disclosed its proposed surcharge to the plaintiff prior to finalizing a sale, and therefore complied with the statute. *Id.*

At least one federal district court (in addition to the district court that addressed and ultimately dismissed Bowden's claims in this matter) has similarly concluded that businesses can pass the B&O tax to consumers "so long as the tax is disclosed to the consumer during the course of negotiating a purchase price." *NVER Enters., Inc. v. W. Motor Coach*, No. C08-5577 FDB, 2009 U.S. Dist. LEXIS 106759, at *7 (W.D. Wash. Nov. 16, 2009) (internal quotation marks and citation omitted).[3] The district court in *NVER* discussed *Johnson* and concluded that the defendant in *NVER* – like the defendant in *Johnson* – complied with Washington law regarding the B&O tax because the plaintiff "was put on notice that the Washington B&O tax would be included in the wholesale price as a part of the commercial dealings between the parties." *Id.* at *8. The rule of law

[3] General Rule 14.1 states that parties may cite unpublished opinions from other jurisdictions "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." The United States District Court for the Western District of Washington permits citation to unpublished opinions. *See, e.g., Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 2d 1206, 1217 (W.D. Wash. 2010) (*citing* unpublished opinion); *see also* Ninth Circuit Rule 36-3(b) ("Unpublished dispositions and orders of this court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1.").

that emerges from these cases is clear: a seller may recoup its B&O taxes if, prior to a sale, it discloses that it collects a B&O surcharge to cover such taxes.

The law is equally clear that a business need only disclose the fact of the B&O surcharge and not the specific amount of the surcharge. In *Robinson*, for example, the defendant car rental companies quoted a rental rate (such as "$29 a day") and then referred generically to "[c]oncession recoupment fees" without providing a specific dollar amount. 106 Wn. App. at 116-20. The court found that such a disclosure was sufficient under Washington's consumer protection statute even though – as here – the exact amount of the fee was not disclosed. *Id.* at 120.

The federal court's opinion in *Smale*, also speaks to this issue. In *Smale*, the plaintiffs challenged Verizon's practice of charging an "Effect of City Tax" fee. There, as here, Verizon disclosed the fact of such fees but did not disclose the name or amount of the fees. 547 F. Supp. 2d at 1186. The court dismissed the plaintiffs' claims as a matter of law, noting that "[c]ustomers who contacted Verizon with questions about the nature of the fee might have a claim if Verizon refused to provide such information or made misleading statements, but that is not the case before the court." *Id.* at 1187. Thus, *Smale*, like *Robinson* above, establishes that

it is sufficient to disclose the fact that a fee will be assessed without also providing the amount.

Nor are the above courts alone in so holding. The district court in this case cited *Smale* with approval and applied the same reasoning to the B&O surcharge at issue in this case. ER 17-18 n.6. Indeed, the court described the contrary argument – that Cingular somehow violated RCW 82.04.500 by not disclosing the exact amount it would charge each month – as "contrary to previous decisions and common sense." *Id.* The court also noted that such rates "are readily ascertainable." *Id.* It then concluded that Cingular is "not obligated to predict and then state months in advance the precise amounts of the variable B&O surcharges." *Id.* Critically, despite the clarity of the Ninth Circuit's certification order, Bowden has not cited any contrary authority and says nothing in response to the district court's reasoned analysis.

That Bowden ignores the above analysis is not surprising, because he would be hard-pressed to argue otherwise. As noted above, Bowden testified at his deposition that he was familiar with Washington's B&O tax. SER 56. In addition, as the district court recognized in *Smale*, Bowden could have contacted Cingular if he had any questions about the B&O surcharge or how it would be calculated. The Washington

Department of Revenue also maintains a website regarding such taxes, which specifically states that "the state B&O tax is a gross receipts tax" and then provides a "list of B&O tax rates."[4] All of this information was available to Bowden, along with Cingular's comprehensive disclosures and customer service representatives, *before* he finalized his purchase.

Equally important, interpreting RCW 82.04.500 to require wireless service providers to disclose in advance both the fact and the amount of a B&O surcharge makes no sense for companies – like Cingular – whose invoices necessarily vary according to customer usage. Contrary to Bowden's misleading assertion (Appellant's Opening Brief at 2), Bowden did not simply purchase a calling plan with an established price. Rather, like most wireless phone users, Bowden subscribed to a *monthly service contract* that included a number of charges – such as additional minutes, text messages, and internet use – that would *necessarily vary according to his own usage*. *E.g.*, ER 135-41. Thus, as the district court noted (ER 17-18 n.6), it is simply not possible for a wireless service provider like Cingular to predict in advance the precise amount of the B&O surcharge that would correspond to its subscribers' purchases. The Court should not

[4] http://dor.wa.gov/content/findtaxesandrates/bandotax/.

interpret RCW 82.04.500 to require such an impossible task. *See, e.g.*, *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 620, 229 P.3d 774 (2010) ("Courts should avoid reading a statute in a way that results in unlikely, absurd, or strained consequences ....").

Finally, Bowden's interpretation of the B&O tax statute also raises preemption concerns. In *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. 2008), the Ninth Circuit held that the Federal Communications Act does not preempt RCW 82.04.500 because the Washington statute regulates *disclosures* rather than prohibiting charges and so does not regulate rates. 535 F.3d at 1055 n.1, 1058. Despite that holding, Bowden callously claims that wireless service providers must simply absorb Washington's B&O tax as an item of overhead. Appellant's Opening Brief at 1. If RCW 82.04.500 were interpreted that way, it would necessarily be preempted.

Moreover, for wireless service providers like Cingular that have uniform national pricing, absorbing Washington's B&O tax as an item of overhead – as Bowden demands – would mean passing on to subscribers in other states overhead costs that are unique to Washington. Such an interpretation of RCW 82.04.500 is not only absurd, which is sufficient reason to reject it, but would also raise additional preemption concerns

because of the resulting *nationwide* impact on wireless customers and wireless service providers like Cingular. For this reason too, the proper answer to the certified question is "yes."

B. The Court Should Reject Bowden's Arguments, Including His Misguided Request That The Court Should Reformulate The Certified Question Even Though The Ninth Circuit Specifically Rejected That Request In Certifying This Matter.

Bowden's principal response to the Ninth Circuit's certification order is to ask this Court to reformulate the certified question because – he claims – it "assumes facts that are not in evidence." Appellant's Opening Brief at 11. But if that were true – and it plainly is not – the Ninth Circuit presumably would have framed the issue differently. Bowden candidly admits that he asked the Ninth Circuit to certify such a question and that it declined to do so. *Id.* at 4. It makes no sense whatsoever for this Court to reformulate the certified question as Bowden suggests and then answer a question that the Ninth Circuit rejected. The Ninth Circuit has recognized that "certification saves time, energy, and resources and helps build a cooperative judicial federalism...." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1084, 1085 (9th Cir. 2002) (internal quotation marks and citation omitted). Bowden's request, in contrast, would waste time, energy, and resources and thereby turns the certification process on its head.

Equally important, the certified question is entirely consistent with record evidence. The page of the 2004 Contract that Bowden signed expressly stated that Bowden's monthly charges would include a "gross receipts surcharge." ER 163-65. The B&O surcharge is such a surcharge. The 2004 Contract also disclosed that charges would include "applicable taxes and governmental fees, whether assessed directly upon you or upon Cingular." SER 97. Bowden attested that he agreed to and accepted those terms and conditions. ER 163-65. Regardless of whether or not he read the document (some subscribers do, some do not), it is undisputed that Cingular provided ample information to Bowden before he made his purchase and that he represented that he had read the contract, understood it, and agreed to be bound by its terms. *Id.*

The record also shows that Cingular provided additional disclosures to Bowden prior to the final sale, above and beyond the 2004 Contract. Rate plans at the time stated that Cingular would include a "gross receipts surcharge" on the monthly bills. ER 160-61. Cingular's website also included an "Understanding Your Bill" page, which similarly explained that "gross receipts surcharges" would appear on Bowden's bill if he purchased service, and an additional page providing even more information about gross receipts surcharges. SER 232. All of this

information was known or available to Bowden *before* he finalized his purchase.

On these facts, the Ninth Circuit correctly concluded that "Cingular disclosed that it would charge and collect a surcharge for gross receipts taxes before Bowden purchased his phone service plan." Certification Order at 1333. The district court, too, concluded that "the B&O surcharge was disclosed during the negotiation process." ER 3, 17. Thus, far from "assum[ing] facts that are not in evidence," as Bowden suggests (Appellant's Opening Brief at 11), the certified question appropriately reflects both the Ninth Circuit's and the district court's considered analysis. Bowden's threshold argument – that the Court should reformulate the certified question – therefore fails.

Bowden's discussion of applicable legal principles is equally flawed. Bowden completely ignores *NVER*, *Robinson*, and *Smale* even though each of those cases is directly on point, even though the district court in this matter cited *Smale* with approval and applied it to the facts at issue here, and even though Bowden's counsel were also counsel in *Smale*. Instead, he misconstrues the appellate court's opinion in *Johnson* and this Court's earlier opinion in *Nelson*. He likewise misconstrues the Ninth Circuit's opinion in *Peck*, which similarly undermines his strained

interpretation of Washington's B&O tax statute. Bowden's discussion of those three cases (*Johnson*, *Nelson*, and *Peck*) is addressed briefly below.

Starting with *Johnson*, Bowden claims that the price in that case "include[d] the cost of the B&O tax" whereas here the B&O surcharge was separately stated. Appellant's Opening Brief at 1. The court in *Johnson* specifically addressed this point, noting that "[t]he writeback lists a B&O tax of $136.75." 148 Wn. App. at 183. Contrary to Bowden's assertion, the B&O tax in *Johnson* – like the B&O surcharge here – was disclosed during the negotiations as a separate charge that (along with other charges) would determine the total amount that the consumer ultimately paid. *Id.*

Turning to *Nelson*, Bowden's reliance on that opinion is misplaced because the *legal principle* articulated in *Nelson* – as discussed on pages 10-11 above – fully supports Cingular's argument that Washington businesses can properly pass the B&O tax on to consumers so long as the B&O surcharge is disclosed before finalizing the sale. While the Court in *Nelson* found that the defendant there violated RCW 82.04.500, it did so because the defendant car dealer passed the "B&O tax" on to a customer *after* the parties had reached agreement on the total sales price. 160 Wn.2d at 178. Here, in contrast, both the Ninth Circuit and the district

court found, and record evidence confirms, that Cingular disclosed the B&O surcharge to Bowden *before* finalizing his sale. *See* discussion on pages 18-19 above. Thus, as the district court in this matter correctly concluded, this matter "is factually more analogous to *Johnson* than to *Nelson*." ER 3, 17.

Finally, Bowden similarly mischaracterizes the Ninth Circuit's earlier opinion in *Peck*. According to Bowden, the court in *Peck* held that RCW 82.04.500 "mandat[es] that businesses quote all prices inclusive of Washington's B&O tax." Appellant's Opening Brief at 13 (brackets in original) (*quoting Peck*, 535 F.3d at 1058). Contrary to Bowden's assertion, that does not mean that Cingular must "include the B&O tax in its prices" and cannot add "the tax on top of those prices." *Id.* Rather, it means that the B&O surcharge must be disclosed to the purchaser *before* finalizing a sale (as in *Johnson* and *NVER*) rather than added to the price *after* the sale is finalized (as in *Nelson*).

Indeed, the Ninth Circuit clearly stated that point in a portion of *Peck* that Bowden ignores. Addressing Washington's B&O tax statute, the Ninth Circuit held: "Under RCW 82.04.500, businesses are allowed to itemize the B&O Tax and pass the B&O Tax to the consumer, so long as the tax is disclosed to the consumer *during* the course of negotiating a

purchase price." *Peck*, 535 F.3d at 1058 (internal quotation marks and citation omitted). The district court in *NVER* interpreted *Peck* the same way. After discussing *Johnson* – much the same as set forth above – the court in *NVER* added:

> The Ninth Circuit has interpreted RCW 82.04.500 in the same fashion. Rather than prohibiting a pass through of the B&O tax, the statute "simply structures the contract's negotiation and disclosure, mandating that businesses quote all prices inclusive of Washington's B&O Tax. Under RCW 82.04.500, businesses are allowed to itemize the B&O Tax and pass the B&O Tax to the consumer, so long as the tax is disclosed to the consumer during the course of negotiating a purchase price."

NVER, 2009 U.S. Dist. LEXIS 106759, at *7 (*quoting Peck*, 535 F.3d at 1057-58).[5] As this discussion shows, Bowden's legal analysis – like his factual analysis – is seriously flawed.

V. CONCLUSION

As set forth above, the proper answer to the Ninth Circuit's certified question is "yes."

[5] *See also Hesse v. Sprint Corp.*, 598 F.3d 581, 586 (9th Cir. 2010) (*citing Peck* for proposition that B&O tax statute regulates "the method of disclosure" of surcharges).

Dated: March 9, 2011.

Respectfully submitted,

/s/ Leonard J. Feldman

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CERTIFICATE OF SERVICE

I, Cindy Castro, certify that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is: Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101-3197.

That on March 9, 2011 I caused to be hand delivered by legal messenger service a true and correct copy of the foregoing Appellees' Opposing Brief on Certification from the Ninth Circuit Court of Appeals on the following counsel of record:

Daniel F. Johnson
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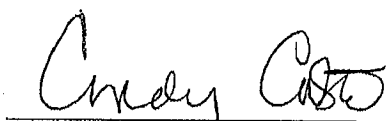
Dated this 9th day of March, 2011 at Seattle, Washington.



Cindy Castro